REME COURT, U. S.

No. 70

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IN THE

Supreme Court of the United States

October Term, 1967

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully prays the Court to grant a rehearing in this cause.

I.

As far as can be determined, this is the first time in its history that the Supreme Court has been unable to decide the meaning of a *treaty* of the United States.[1]

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[1] The case was argued on March 11, 1968. The equal division of the Court was announced March 25, 1968. The judgment reads:

"Per Curiam.

"The judgments are affirmed by an equally divided Court.

"Mr. Justice Marshall took no part in the consideration or decision of this case."

At issue here is the meaning of Article 3 of the Warsaw Convention,[2] a treaty of the United States and the supreme Law of the land.[3]

This Court observed in *Sullivan* v. *Kidd*[4] that "the construction of a treaty is judicial in its nature."[5] As the final arbiter of the meaning of treaty obligations of the United States, this Court must ensure that they are adhered to "in the utmost good faith" and that they "are faithfully kept and observed."[6] No effort has ever been spared by this Court, no avenue has been left unexplored, in arriving at the meaning of a treaty of the United States.[7]

In the past where there has been apparent difficulty in reaching a decision in a treaty case, the Court has ordered reargument. See, *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928); *Sullivan* v. *Kidd,* 254 U.S. 433 (1921).

Surely the reasons which prompted reargument in those cases are no less compelling in this case.

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, October 12, 1929. 49 *Stat.* 3000 *et seq.;* T.S. 876.

[3] U.S. CONST. art. VI, cl. 2.

[4] 254 U.S. 433 (1921).

[5] *Id.* at 442.

[6] *Id.* at 439, 442.

[7] For example see, *Corbett* v. *Stergios,* 381 U.S. 124 (1965); *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961); *Bacardi Corp.* v. *Domenech,* 311 U.S. 150 (1940); *Valentine* v. *United States,* 299 U.S. 5 (1936); *Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Cook* v. *United States,* 288 U.S. 102 (1933); *Santovincenzo* v. *Egan,* 284 U.S. 30 (1931); *Nielsen* v. *Johnson,* 279 U.S. 47 (1929); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928); *Terrace* v. *Thompson,* 263 U.S. 197 (1923); *Sullivan* v. *Kidd,* 254 U.S. 433 (1921); *Charlton* v. *Kelly,* 229 U.S. 447 (1913).

II.

The equal division of the Court indicates that agreement upon the meaning of Article 3 of the Warsaw Convention cannot be reached upon the basis of the language employed.

Where this apparent difficulty has arisen in prior cases, the Court has explored the negotiations leading to the making of the treaty, the conditions existing at the time and the purposes sought to be achieved.[8] In *Factor* v. *Laubenheimer*, 287 U.S. 713 (1933), for example, shortly after argument the Court requested reargument and directed the attention of counsel to "the available diplomatic correspondence" pertaining to the treaty involved.

The Court has also placed considerable reliance upon the practical understanding of the parties to a treaty in ascertaining its meaning. At the Hague Conference in 1955 the parties to the Warsaw Convention had considered it necessary to amend the treaty to (1) require notice of its applicability and (2) impose the non-delivery sanction of Article 3 in the absence of such notice in the passenger ticket.[9]

With respect to the views of the United States, submitted at the petition level, the Memorandum for the United States did not address itself to the meaning of the

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[8] See, *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961), *Valentine* v. *United States*, 299 U.S. 5 (1936), *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933), *Cook* v. *United States*, 288 U.S. 102 (1933), *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931), *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) and *Terrace* v. *Thompson*, 263 U.S. 197 (1923).

[9] II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 1-3 (1956). See also, I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 124, 128, 134 (1956).

language of the treaty or its drafting history. Without explanation, the Memorandum represented a marked departure from the hitherto official position of the United States Government on the meaning of Article 3 as expressed at the Hague Conference in 1955.[10] Rather, the Memorandum for the United States urged that the decision of the Court below was a logical extension of *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), and *Warren* v. *The Flying Tiger Line, Inc.*, 352 F. 2d 494 (9th Cir. 1965).

We agree that the decision of the Court below *is* a logical extension of the rationale of *Mertens* and *Warren*. See the extended discussion in Note, *Warsaw Convention*—

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[10] At this Conference, which was convened to consider several proposed amendments to the Warsaw Convention, the United States sought and achieved an amendment to Article 3(1) to require that there be included in the passenger ticket:

> "a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, p. 2 (1956).

The sanction in Article 3(2) was also amended, again upon the basis of a proposal by the United States, to read as follows:

> "Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1(*c*) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22." II INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, p. 3 (1956).

The decision of the Court below has now placed the United States Government in the position of having sought and obtained wholly unnecessary amendments to Article 3 in 1955. See, I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140, pp. 124, 128, 134 (1956).

Limited Liability—Notice, 33 J. AIR L. AND COM. 698 (1967).

The underlying rationale of those decisions is that the purpose of the "statement" in the passenger ticket, as to the applicability of the liability rules of the Convention,[11] is to warn the passenger about the limits of liability so that he can take self-protective measures. According to these decisions, the Convention requires delivery of the ticket[12] in order to convey this warning to the passenger. This rationale, however, finds no support in the conditions which gave rise to the making of the Warsaw Convention, the purposes sought to be achieved, the negotiations surrounding the drafting of the Convention or the understanding of the parties themselves. It is clear from this material, and from other transportation conventions adopted previously, that the inclusion of the Article 3(1)(e) statement in the passenger ticket is intended to serve as a "clause paramount". The purpose of this clause was to ensure the avoidance of international conflicts of law problems by the application of the uniform rules of the Warsaw Convention.[13]

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[11] Article 3(1)(e). 49 Stat. 3015.

[12] Article 3(2). 49 Stat. 3015.

[13] The landmark case of *The Hurry On (Vita Food Products* v. *Unus Shipping Co.*), 1939 A.M.C. 257, [1939] A.C. 277, makes clear that the purpose of this kind of clause is to resolve international conflicts of law problems. A similar provision exists in the United States Carriage of Goods by Sea Act that every bill of lading "which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, *shall contain a statement* that it shall have effect subject to provisions of this act." 46 U.S.C. § 1312 (1964) (emphasis added). See, CARVER, CARRIAGE OF GOODS BY SEA 212 (9th ed. 1952); GILMORE & BLACK, LAW OF ADMIRALTY 164 (1954); KNAUTH, OCEAN BILLS OF LADING 157 (4th ed. 1953); Selvig, *"The Paramount Clause"*, 10 AM. J. OF COMP. L. 205, 207-8 (1961).

Because of their admitted and understandable disapproval of the low limit of liability established by the Warsaw Convention, courts of the United States, as represented by the decisions in *Mertens, Warren* and the Court below, have been whittling away at this treaty to accomplish what they consider to be justifiable ends. However, these courts are acting in complete disregard of the solemn obligations undertaken by the United States in the treaty.

The United States Government has declared its intention to remain a party to the Warsaw Convention and to work for increased limits of liability within the framework of the Convention by international agreement.[14] If the Warsaw Convention is now unnecessary or undesirable for the United States, then the United States Government should withdraw in accordance with the machinery established by the treaty, and not stand aside while the treaty is slowly but effectively whittled away by erroneous court interpretation.

III.

In many instances, where reargument has taken place after an affirmance by an equally divided Court, the deadlock which existed among the original members of the Court has been broken. For example, see:

Ladner v. *United States,* 355 U.S. 282 (1958), *rehearing granted,* 356 U.S. 969 (1958). On rehearing, the judgment was reversed by a vote of 8-1. 358 U.S. 169 (1958).

Halliburton Oil Well Cementing Co. v. *Walker,* 326 U.S. 696 (1946); *rehearing granted,* 327 U.S. 812 (1946). On rehearing the judgment was reversed by a vote of 8-1. 329 U.S. 1 (1946).

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[14] DEP'T STATE PRESS RELEASE, No. 111, May 14, 1966.

Bernards v. *Johnson*, 313 U.S. 537 (1941), *rehearing granted*, 313 U.S. 597 (1941). On rehearing the judgment was affirmed by a vote of 9-0. 314 U.S. 19 (1941).

Lisenba v. *State of California*, 313 U.S. 537 (1941), *rehearing granted*, 313 U.S. 597 (1941). On rehearing the judgment was affirmed by a vote of 7-2. 314 U.S. 219 (1941).

Gray v. *Powell*, 312 U.S. 666 (1941), *rehearing granted*, 313 U.S. 596 (1941). On rehearing the judgment was reversed by a vote of 5-3. 314 U.S. 402 (1941).

United States v. *Grimaud*, 216 U.S. 615 (1910). On rehearing the judgment was reversed by a vote of 9-0. 220 U.S. 506 (1911).

The "intensive study attendant upon opinion-writing" [15] presumably enabled the Court to resolve the issues in those cases, even though the judgment in each case had been initially affirmed by an equally divided Court.

As Mr. Justice Frankfurter noted:

> "Due regard for the importance of these cases . . . and the demands of sound adjudication call for reargument. . . .
>
> "The Court has rightly been parsimonious in ordering rehearings, but the occasions on which important and difficult cases have been reargued have, I believe, enhanced the deliberative process" [16]

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[15] *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 75 (1955).

[16] *Detroit* v. *Murray Corp.*, 357 U.S. 913 (1958) (Frankfurter, J. dissenting from the denial of a petition for rehearing).

IV.

The affirmance by the even division of this Court is binding only upon the immediate parties. "[T]he lack of an agreement by a majority of the Court on the principles of law involved prevents" the judgment of the Court "from being an authoritative determination for other cases."[17]

The identical principles of law and questions involved in this case are at issue in countless cases now pending in lower state and federal courts. As a consequence of the even division of this Court, these principles remain unsettled and the questions involved unresolved. Surely, in the interest of uniform application of this treaty of the United States, these questions should be resolved by this Court.

The so-called Montreal Agreement[18] does not lessen in any degree the necessity of resolving these questions for the future. This Agreement was in no way an amendment to the Warsaw Convention. At best, the Agreement constitutes a declaration by the carrier that it will accept liability up to $75,000 per passenger. So long as the United States remains a party to the Warsaw Convention, however, the question will continue to arise as to whether the *treaty* imposes any sanction for the failure to notify the passenger of the limit of liability then applicable.

Similarly, use of the Civil Aeronautics Board required form of notice of the various limits of liability applicable under the Warsaw/Montreal scheme,[19] will not obviate the recurrence of the questions involved herein. The question

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[17] *United States* v. *Pink*, 315 U.S. 203, 216 (1941).

[18] CAB Docket 17325, Order No. E-23680, May 13, 1966. The full text of this Order is printed in the Appendix to this Petition, commencing page 11.

[19] 14 C.F.R. § 221.175.

of whether the *treaty* imposes any sanction for the failure to give notice will arise in every case where the Civil Aeronautics Board form of notice is in fact not used, or is found inadequate for one reason or another to satisfy the requirements of the *treaty*.

V.

Surely the interests of the United States require resolution of the questions involved in this case.

It is the official view of the United States Government that

> "its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention." [20]

Further, the United States Government has declared its firm intention to encourage and participate in

> "continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention.[21]

The United States is regarded as the leading aviation country of the world. What chance does the United States Government have of achieving these announced objectives if the Supreme Court is unable to decide the meaning of the present international commitments in the Warsaw Convention?

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[20] DEP'T STATE PRESS RELEASE No. 111, May 14, 1966, p. 1.

[21] *Id.* at 2.

We believe the result of the even division of this Court is inimical to the interests of the United States. Accordingly, we would respectfully request that, on reargument, Mr. Justice Marshall participate in the consideration and decision of this case.

VI.

The Petition for Rehearing should be granted and the case should be set down for reargument on the regular calendar before a full bench.

Respectfully submitted,

AUSTIN P. MAGNER
GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

THOMAS J. WHALEN
Of Counsel

April, 1968

Certificate of Counsel

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

.....

GEORGE N. TOMPKINS, JR.
Counsel for Petitioner

April, 1968

APPENDIX

Order No. E-23680

UNITED STATES OF AMERICA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.
on the 13th day of May, 1966

Docket 17325

Agreement C.A.B. 18900

Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol

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ORDER APPROVING AGREEMENT

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention, creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation. The United States became a party to the Convention in 1934, and eventually over ninety countries likewise became parties to the Convention.[1] On November

[1] The Convention was amended by the Protocol signed at Hague in 1955 which has never been ratified by the United States. The Convention (subject to certain provisions) limits carriers' liability for death or injury to passengers in international transportation to 125,000 gold francs, or approximately $8,300. The Protocol, subject to certain provisions, provides for liability limitations of approximately $16,600.

15, 1965, the United States Government gave notice of denunciation of the Convention, emphasizing that such action was solely because of the Convention's low limits of liability for personal injury or death to passengers. Pursuant to Article 39 of the Convention this notice would become effective upon six months' notice, in this case, May 15, 1966. Subsequently, the International Air Transport Association (IATA) made efforts to effect an arrangement among air carriers, foreign air carriers and other carriers (including carriers not members of IATA) providing the major portions of international air carriage to and from the United States to increase the limitations of liability now applicable to claims for personal injury and death under the Convention and the Protocol. The purpose of such action is to provide a basis upon which the United States could withdraw its notice of denunciation.

The arrangement proposed has been embodied in an agreement between various air carriers, foreign air carriers, and other carriers which has been filed with the Board pursuant to section 412(a) of the Federal Aviation Act of 1958 and Part 261 of the Board's Economic Regulations and assigned the above designated C.A.B. number.

By this agreement, the parties thereto bind themselves to include in their tariffs, effective May 16, 1966, a special contract in accordance with Article 22(1) of the Convention or the Protocol providing for a limit of liability for each passenger for death, wounding, or other bodily injury of $75,000 inclusive of legal fees, and, in case of a claim brought in a State where provision is made for separate award of legal fees and costs, a limit of $58,000 exclusive of legal fees and costs. These limitations shall be applicable to international transportation by the carrier as defined in the Convention or Protocol which includes a point in the United States as a point of origin, point of

destination, or agreed stopping place. The parties further agree to provide in their tariffs that the Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of the Convention or the Convention as amended by the Protocol. The tariff provisions would stipulate, however, that nothing therein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding, or other bodily injury of a passenger.

The carriers by the agreement further stipulate that they will, at time of delivery of the tickets, furnish to each passenger governed by the Convention or the Protocol and by the special contract described above, a notice in 10 point type advising international passengers of the limitations of liability established by the Convention or the Protocol, or the higher liability agreed to by the special contracts pursuant to the Convention or Protocol as described above. The agreement is to become effective upon approval by this Board, and any carrier may become a party to it by signing a counterpart thereof and depositing it with the Board. Withdrawal from the agreement may be effected by giving 12 months' written notice to the Board and the other Carrier parties thereto.

As indicated, the decision of the United States Government to serve notice to denounce the Convention was predicated upon the low liability limits therein for personal injury and death. The Government announced, however, that it would be prepared to withdraw the Notice of Denunciation if, prior to its effective date, there is a reasonable prospect for international agreement on limits of liability for international transportation in the area of

$100,000 per passenger or on uniform rules without any limit of liability, and if pending such international agreement there is a provisional arrangement among the principal international air carriers providing for liability up to $75,000 per passenger.

Steps have been taken by the signing carriers to have tariffs become effective May 16, 1966, upon approval of this agreement, which will increase by special contract their liability for personal injury or death as described herein. The signatory carriers provide by far the greater portion of international transportation to, from, and within the United States.

The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded that such arrangements warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. The stipulation that no tariff provision shall be deemed to affect the rights and liabilities of the carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which results in death, wounding or other bodily injury of a passenger operates to diminish any incentive for sabotage.

Upon consideration of the agreement, and of matters relating thereto of which the Board takes notice, the Board does not find that the agreement is adverse to the public interest or in violation of the Act and it will be approved.

Accordingly, pursuant to the provisions of the Federal Aviation Act of 1958, and particularly sections 102, 204(a), and 412 thereof:

IT IS ORDERED THAT:

1. Agreement C.A.B. 18900 is approved.

This order will be published in the Federal Register.

By the Civil Aeronautics Board:

HAROLD R. SANDERSON
Secretary

(SEAL)

Certificate of Service

I hereby certify that I have this ~~18th~~ 19th day of April, 1968, served the foregoing Petition for Rehearing upon respondents, the International Air Transport Association, the Air Transport Association of America, the United States, Canada, the United Kingdom of Great Britain and Northern Ireland, the Republic of Italy, Airline Passengers Association, American Trial Lawyers Association, Bates Block, and Arnold Holtzman, *amici curiae,* by depositing same in the United States mailbox at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid addressed to the respective attorneys of record as follows:

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